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3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
5 **SAN JOSE DIVISION**
6

7 ALICE COTTI, et al.,

8 Plaintiffs,

9 v.

10 CITY OF SAN JOSE, et al.,

11 Defendants.
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Case No. 18-cv-02980-BLF

**ORDER TO SHOW CAUSE WHY
UNSERVED DEFENDANTS SHOULD
NOT BE DISMISSED WITHOUT
PREJUDICE; DENYING PLAINTIFFS'
MOTION TO SET ASIDE JUNE 24
ORDER; DENYING WITHOUT
PREJUDICE MOTION TO ADD
DEFENDANTS AND FILE A FOURTH
AMENDED COMPLAINT; AND
EXTENDING DEADLINE TO FILE A
PROPERLY NOTICED MOTION FOR
LEAVE TO AMEND THE
COMPLAINT**

[Re: ECF 126]

17 On June 24, 2019, the Court issued an order (“June 24 Order”) addressing several pending
18 motions and summarizing the status of the case with respect to the twenty-four defendants named
19 in the operative third amended complaint. *See* June 24 Order, ECF 125. The Court ordered as
20 follows:

21 (1) Seven defendants were dismissed without leave to amend pursuant to their
22 unopposed motions to dismiss: Rebekah Children’s Services, City of San Jose, San Jose Police
23 Department, Judge Patrick E. Tondreau, Amy Choi, Nikolas Arnold, and County of Santa Clara.

24 (2) Eight defendants were dismissed *sua sponte*, without prejudice to a motion for
25 leave to amend the pleading, because they were added in violation of the Court’s order: Officer
26 Gaona, Officer Avila, Sergeant Vu Tran, Family Legal Advocates, Dependency Advocacy Center,
27 Wesley Schroeder, John Faulconer, and Legal Advocates for Youth and Children. Plaintiffs were
28 directed to file any motion for leave to amend to add these defendants on or before July 24, 2019.

1 (3) Service of process was quashed as to five defendants: Francesca LeRue, Pa Chang,
2 Phu Nguyen, Jeff Johnson, and Sarah Gerhart. Plaintiffs were granted thirty days, until July 24,
3 2019, to effect service of process on these defendants.

4 (4) Four defendants had not been served: Department of Social Services, Santa Clara
5 County Department of Family and Child Services, Social Security Agency of Santa Clara County,
6 and Amy Guy. Plaintiffs were directed to file a status report as to these defendants, and the
7 defendants as to whom service of process was quashed, on or before July 26, 2019.

8 Plaintiffs did not file a properly noticed motion for leave to amend to add defendants; did
9 not effect service of process on Defendants LeRue, Chang, Nguyen, Johnson, and Gerhart; and did
10 not file a status report with respect to Defendants Department of Social Services, Santa Clara
11 County Department of Family and Child Services, Social Security Agency of Santa Clara County,
12 and Amy Guy. Instead, Plaintiffs filed a “Motion to Set Aside Order of June 24, 2019; Motion to
13 Add Defendants; Motion for Leave to File Fourth Amended Complaint.” *See* Pls.’ Motion, ECF
14 126. The Court addresses service of process, Plaintiffs’ motion to set aside the June 24 Order, and
15 Plaintiffs’ failure to file a properly noticed motion for leave to amend in turn, as follows.

16 **I. SERVICE OF PROCESS**

17 Plaintiffs were granted thirty days, until July 24, 2019, to effect service of process on
18 Defendants LeRue, Chang, Nguyen, Johnson, and Gerhart. Plaintiffs have not filed proofs of
19 service with respect to these defendants. Plaintiffs filed a status report on July 20, 2019, stating
20 that “Plaintiffs have provided information available to a process server to provide proper service
21 upon Defendants LaRue, Chang, Gerhart, Johnson and Nguyen. As of the time of the preparation
22 of this report, those Defendants have not been served.” Status Report, ECF 127.

23 Plaintiffs were ordered to submit a status report regarding the status of service of process
24 on Defendants Department of Social Services, Santa Clara County Department of Family and
25 Child Services, Social Security Agency of Santa Clara County, and Amy Guy. Plaintiffs have not
26 complied. The status report submitted on July 20, 2019 does not address these defendants.

27 Plaintiffs are ORDERED TO SHOW CAUSE, in writing and on or before September 18,
28 2019, why the following unserved Defendants should not be dismissed for failure to effect service

of process as required under Federal Rule of Civil Procedure 4(m): Francesca LeRue, Pa Chang, Phu Nguyen, Jeff Johnson, Sarah Gerhart, Department of Social Services, Santa Clara County Department of Family and Child Services, Social Security Agency of Santa Clara County, and Amy Guy.

II. PLAINTIFFS' MOTION TO SET ASIDE JUNE 24 ORDER

Plaintiffs have filed a motion to set aside the June 24 Order, which the Court takes to be a motion to vacate the June 24 Order. *See* Pls.' Motion, ECF 126. Plaintiffs' motion does not articulate any legal basis for vacating the June 24 Order. Plaintiffs explain that their attorney, Michelle Brenot, suffered an illness which caused her to be out of the office from early March 2019 through April 19, 2019. It is during that period of absence that Plaintiffs' oppositions were due with respect to the motions to dismiss filed by Rebekah Children's Services, City of San Jose, San Jose Police Department, Judge Patrick E. Tondreau, Amy Choi, Nikolas Arnold, and County of Santa Clara. Plaintiffs assert that Ms. Brenot did not even realize that the motions to dismiss had been filed until the Court issued its June 24 Order granting them.

Several Defendants have filed opposition to Plaintiffs' motion to vacate the June 24 Order, including the County of Santa Clara, Amy Choi, Nikolas Arnold, and the City of San Jose parties. *See* Defs.' Opps., ECF 129, 131, 132. Defendants note that Plaintiffs' motion is not accompanied by a declaration or other evidence of Ms. Brenot's illness, but they argue that even if the Court accepts that Ms. Brenot was ill from early March through late April, two months elapsed between Ms. Brenot's late April return to work and the Court's June 24 Order. Plaintiffs offer no explanation why they did not respond to the motions to dismiss during that two-month period. Moreover, Defendants argue that Plaintiffs' representation that Ms. Brenot was unaware of the motions to dismiss until she received the June 24 Order is belied by the fact that Ms. Brenot signed a Joint Stipulation on May 14, 2019, asking the Court to continue the Case Management Conference pending disposition of the motions to dismiss. *See* Joint Stipulation, ECF 122. Finally, Defendants argue that the pleading deficiencies discussed in the June 24 Order cannot be cured by amendment.

In response to these arguments, Ms. Brenot has filed a declaration and medical records

documenting her illness. *See* Brenot Decl., ECF 133. Ms. Brenot acknowledges that she “had, if not actual knowledge of the various motions by counsel, constructive notice of the motions as of May 5, 2019” when she agreed to the stipulated request to continue the Case Management Conference.¹ Brenot Decl. ¶ 5. Ms. Brenot nonetheless states her opinion that the Court could grant relief from the June 24 Order under Federal Rule of Civil Procedure 60(b). Brenot Decl. ¶ 8. Ms. Brenot offers no argument or citation to legal authority in support of a request for relief under Rule 60(b).

On August 29, 2019, the Court vacated the hearing on Plaintiffs’ motion and took the motion under submission without oral argument. Order Vacating October 10, 2019 Hearing, ECF 135. The Court also continued the Case Management Conference to December 5, 2019. *Id.*

Plaintiffs’ moving papers articulate no legal basis whatsoever for vacating the June 24 Order. Ms. Brenot’s declaration filed in reply to the opposition briefing suggests that relief is warranted under Federal Rule of Civil Procedure 60(b). *See* Brenot Decl. ¶ 8, ECF 133. The Court declines to consider a legal argument raised for the first time in a reply declaration. Plaintiffs’ motion to vacate the June 24 Order is subject to denial on that basis.

Even if it were to consider whether relief is warranted under Rule 60(b), the Court would conclude that it is not. Under Rule 60(b), a court may grant relief from a judgment or order upon a showing of “(1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) ‘extraordinary circumstances’ which would justify relief.” *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991); *see also* Fed. R. Civ. P. 60(b). The only arguably applicable subsections are (b)(1) and (b)(6).

To the extent Plaintiffs assert excusable neglect warranting relief under Rule 60(b)(1), “[e]xcusable neglect encompasses situations in which the failure to comply with a filing deadline is attributable to negligence, and includes omissions caused by carelessness.” *Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (internal quotation marks, citations, and alterations omitted). “The determination of whether neglect is excusable ‘is at bottom an equitable one,

¹ Ms. Brenot’s signature on the Joint Stipulation is dated May 14, 2019, not May 5, 2019. *See* Joint Stipulation, ECF 122.

1 taking account of all relevant circumstances surrounding the party's omission.” *Id.* (quoting
2 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993)). “To determine
3 when neglect is excusable, we conduct the equitable analysis specified in *Pioneer* by examining at
4 least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and
5 its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant
6 acted in good faith.” *Id.* (internal quotation marks and citation omitted).

7 Weighing the *Pioneer* factors, the Court concludes that relief under Rule 60(b)(1) is not
8 warranted. As to factor (1), vacating the June 24 Order would be highly prejudicial to Defendants,
9 particularly to the seven Defendants who brought motions to dismiss and were granted dismissal
10 with prejudice in a reasoned order applying Rule 12(b) standards. As to factor (2), Plaintiffs did
11 not delay in seeking relief from the June 24 Order. Factor 3, the reasons for any delay, therefore is
12 inapplicable. As to factor (4), the Court cannot find that the failure to oppose Defendants’
13 motions to dismiss was in good faith. While the Court is sympathetic to Ms. Brenot’s illness, it
14 appears that she made no provision for management of her cases in her absence, and no
15 satisfactory explanation has been proffered for her failure to respond to Defendants’ motions
16 during the two-month period between her return to work and the issuance of the June 24 Order.
17 The Court has granted Ms. Brenot multiple extensions of prior deadlines, and it has issued a prior
18 Order to Show Cause why the case should not be dismissed for failure to prosecute based on
19 failure to comply with deadlines. *See* ECF 72, 73, 74, 76, 96, 99, 106. Against this backdrop, and
20 absent evidence of any reasonable attempt to comply with case deadlines, the Court finds the
21 failure to oppose Defendants’ motions to be in bad faith.

22 To the extent Plaintiffs assert the existence of extraordinary circumstances warranting
23 relief under Rule 60(b)(6), the Ninth Circuit has “cautioned that this Rule is to be used sparingly
24 as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary
25 circumstances prevented a party from taking timely action to prevent or correct an erroneous
26 judgment.” *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (quotation marks and citation
27 omitted). The requisite extraordinary circumstances have been found to exist “where the client
28 has demonstrated gross negligence on the part of his counsel” which resulted in a default judgment

1 against the client. *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002). Plaintiffs
2 have not argued, and the Court is not persuaded, that Ms. Brenot's failure to oppose the motions to
3 dismiss constituted gross negligence arising to the level of extraordinary circumstances.

4 As discussed above, Plaintiffs' passing reference to Rule 60(b) in a reply declaration
5 would not provide an adequate basis for vacating the June 24 Order under any circumstances.
6 However, even if the Court were to consider Plaintiffs' request for relief under Rule 60(b) on the
7 merits, the request would be denied.

8 Accordingly, Plaintiffs' motion to set aside the June 24 Order is DENIED.

9 **III. PLAINTIFFS' MOTION TO FILE A FOURTH AMENDED COMPLAINT**

10 As discussed above, when the Court *sua sponte* dismissed Officer Gaona, Officer Avila,
11 Sergeant Vu Tran, Family Legal Advocates, Dependency Advocacy Center, Wesley Schroeder,
12 John Faulconer, and Legal Advocates for Youth and Children, the Court directed Plaintiffs to file
13 any motion for leave to amend to add these defendants on or before July 24, 2019. Plaintiffs'
14 motion filed July 20, 2019 includes a motion to add defendants and file a fourth amended
15 complaint. *See* Pls.' Motion, ECF 126. The motion is procedurally improper, however. Civil
16 Local Rule 7-1 requires that "[a]ny written request to the Court for an order must be presented by
17 one of" a list of enumerated motions or by stipulation. Civ. L.R. 7-1. The only enumerated
18 motion that fits the circumstances is a "[d]uly noticed motion pursuant to Civ. L.R. 7-2." *Id.*
19 Plaintiffs' motion to add defendants and file a fourth amended complaint was not filed as a duly
20 noticed motion. Moreover, Civil Local Rule 10-1 requires that "[a]ny party filing or moving to
21 file an amended pleading must reproduce the entire proposed pleading" Civ. L.R. 10-1.
22 Plaintiffs have not submitted a proposed fourth amended complaint. Accordingly, the motion to
23 add defendants and file a fourth amended complaint is DENIED.

24 The Court's ruling is WITHOUT PREJUDICE to the filing of a properly noticed motion
25 for leave to amend the pleading which complies in all respects with the Civil Local Rules and this
26 Court's Standing Order Re Civil Cases. In particular, any motion for leave to amend must include
27 a proposed amended pleading, and Plaintiffs must reserve a hearing date before filing such motion.
28 The Court *sua sponte* extends Plaintiffs' deadline to seek leave to amend to September 18, 2019.

IV. ORDER

(1) Plaintiffs are ORDERED TO SHOW CAUSE, in writing and on or before September 18, 2019, why the following unserved Defendants should not be dismissed for failure to effect timely service of process as required under Federal Rule of Civil Procedure 4(m): Francesca LeRue, Pa Chang, Phu Nguyen, Jeff Johnson, Sarah Gerhart, Department of Social Services, Santa Clara County Department of Family and Child Services, Social Security Agency of Santa Clara County, and Amy Guy.

(2) Plaintiffs' motion to set aside the June 24 Order is DENIED.

(3) Plaintiffs' motion to add defendants and file a fourth amended complaint is DENIED as procedurally improper.

(4) The Court's ruling is WITHOUT PREJUDICE to the filing of a motion for leave to amend the pleading which complies in all respects with the Civil Local Rules and this Court's Standing Order Re Civil Cases. Any such motion shall be filed on or before September 18, 2019.

Dated: September 4, 2019



BETH LABSON FREEMAN
United States District Judge